Billing Code: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

Manual for Courts-Martial; Amendments to Part IV Discussion and Appendix 22

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Publication of Discussion and Analysis (Supplementary Materials) accompanying the Manual for Courts-Martial, United States (2012 ed.) (MCM).

SUMMARY: The JSC hereby publishes Supplementary Materials accompanying the MCM as amended by Executive Orders 13643, 13669, and 13696. These changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency. These Supplementary Materials have been approved by the JSC and the Acting General Counsel of the Department of Defense.

DATES: The Supplementary Materials are effective as of [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Major Harlye S.M. Carlton, USMC, (703) 963-9299 or harlye.carlton@usmc.mil. The JSC website is located at: http://jsc.defense.gov.

SUPPLEMENTARY INFORMATION:

Annex

Section 1: The Discussion to Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) A new Discussion is inserted immediately after Paragraph 40.c.1. and reads as follows:

"Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the service member was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention."

(b) A new Discussion is inserted immediately after Paragraph 103a.c.1. and reads as follows:

"Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the service member was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention."

Sec. 2: Appendix 22 of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Note at the beginning of the first paragraph, Section I, General Provisions, is deleted.

(b) Section I, General Provisions, is amended by adding the following after the final paragraph:

"*2013 Amendment.* On December 1, 2011, the Federal Rules of Evidence were amended by restyling the rules, making them simpler to understand and use, without changing the substantive meaning of any rule.

In light of the amendments to the Federal Rules of Evidence, significant changes to the Military Rules of Evidence (Mil. R. Evid.) were implemented by Executive Order 13643, dated May 15, 2013. In addition to stylistic changes that harmonize the Mil. R. Evid. with the Federal Rules, the changes also ensure that the rules address the admissibility of evidence, rather than the conduct of the individual actors. Like the Federal Rules of Evidence, these rules ultimately

dictate whether evidence is admissible and, therefore, it is appropriate to phrase the rules with admissibility as the focus, rather than a focus on the actor (i.e., the commanding officer, military judge, accused, etc.).

The rules were also reformatted, and the new format achieves a clearer presentation. This was accomplished by indenting paragraphs with headings and hanging indents to allow the practitioner to distinguish between different subsections of the rules. The restyled rules also reduce the use of inconsistent terms that are intended to mean the same thing but may, because of the inconsistent use, be misconstrued by the practitioner to mean something different.

While most of the changes avoid any style improvement that might result in a substantive change in the application of the rule, some of those changes to the rules were proposed with the express purpose of changing the substantive content of the rule in order to affect the application of the rule in practice. The analysis of each rule clearly indicates whether the drafters intended the changes to be substantive or merely stylistic. The reader is encouraged to consult the analysis of each rule if he or she has questions as to whether the drafters intended a change to the rule to have an effect on a ruling of admissibility."

(c) The analysis following Mil. R. Evid. 101 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* In subsection (a), the phrase "including summary courts-martial" was removed. The drafters recommended removing this phrase because Rule 1101 already addresses the applicability of these rules to summary courts-martial. In subsection (b), the word "shall" was changed to "will" in accordance with the approach of the Advisory Committee on Evidence Rules to minimize the use of words such as "shall" and "should" because of the potential disparity in application and interpretation of whether the word is precatory or prescriptive. *See*

Fed. R. Evid. 101, Restyled Rules Committee Note. The drafters did not intend this amendment to change any result in any ruling on evidence admissibility.

The discussion sections do not have the force of law and may be changed without an Executive Order, as warranted by changes in applicable case law. The discussion sections should be considered treatise material and are non-binding on the practitioner.

This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(d) The analysis following Mil. R. Evid. 103 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(e) The analysis following Mil. R. Evid. 104 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(f) The title of the analysis section of Mil. R. Evid. 105 is changed to "Limiting evidence that is not admissible against other parties or for other purposes."

(g) The analysis following Mil. R. Evid. 105 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(h) The analysis following Mil. R. Evid. 106 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(i) The analysis following Mil. R. Evid. 201 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. Former subsection (d) was subsumed into subsection (c) and the remaining subsections were renumbered accordingly. The drafters did not intend to change any result in any ruling on evidence admissibility."

(j) The numbering and title of the analysis section of Mil. R. Evid. 201A is changed to "Rule 202 Judicial notice of law."

(k) The analysis following Mil. R. Evid. 202 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* Former Rule 201A was renumbered so that it now appears as Rule 202. In previous editions, Rule 202 did not exist and therefore no other rules were renumbered as a result of this change. The phrase "in accordance with Mil. R. Evid. 104" was added to subsection (b). This amendment clarifies that Rule 104 controls the military judge's relevancy determination.

This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(l) The analysis following Mil. R. Evid. 301 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* In subsection (d), the word "answer" should be defined as "a witness's . . . response to a question posed." *Black's Law Dictionary* 100 (8th ed. 2004). Subsection (d) only applies when the witness's response to the question posed may be incriminating. It does not apply when the witness desires to make a statement that is unresponsive to the question asked for the purpose of gaining protection from the privilege.

Former subsections (d) and (f)(2) were combined; this change makes the rule easier to use. The issues typically arise chronologically in the course of a trial, because a witness often testifies on direct without asserting the privilege and then, during the ensuing cross-examination, asserts the privilege.

Former subsection (b)(2) was moved to a discussion section; the drafters recommended this change because subsection (b)(2) addresses conduct rather than the admissibility of evidence. *See supra*, General Provisions Analysis. The word "should" was changed to "may;" the drafters proposed this recommendation in light of CAAF's holding in *United States v. Bell*, 44 M.J. 403 (C.A.A.F. 1996). In that case, CAAF held that Congress did not intend for Article 31(b) warnings to apply at trial, and noted that courts have the discretion, but not an obligation, to warn witnesses on the stand. *Id*. at 405-06. If a member testifies at an Article 32 hearing or court-martial without receiving Article 31(b) warnings, his or her Fifth Amendment rights have not been violated and those statements can be used against him or her at subsequent proceedings. *Id*.

In subsection (e), the phrase "concerning the issue of guilt or innocence" was removed; the drafters recommended this change because this subsection applies to the presentencing phase of the trial as well as the merits phase. The use of the term "concerning the issue of guilt or innocence" incorrectly implied that the subsection only referred to the merits phase. The rule was renamed "Limited Waiver," changed from "Waiver by the accused"; the drafters recommended this change to indicate that when an accused who is on trial for two or more offenses testifies on direct as to only one of the offenses, he or she has only waived his or her rights with respect to that offense and no other. This subsection was moved earlier in the rule and renumbered; the drafters recommended this change to address the issue of limited waivers earlier because of the importance of preserving the accused's right against self-incrimination.

The remaining subsections were renumbered as appropriate. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(m) The analysis following Mil. R. Evid. 302 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic. The drafters did not intend to change any result in any ruling on evidence admissibility."

(n) The analysis following Mil. R. Evid. 303 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and addresses admissibility rather than conduct. *See supra,* General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(o) The analysis following Mil. R. Evid. 304 is amended by adding the following language after the final paragraph:

"2013 Amendment. Former subsection (c), which contains definitions of words used throughout the rule, was moved; it now immediately follows subsection (a) and is highly visible to the practitioner. Former subsection (h)(3), which discusses denials, was moved to subsection (a)(2); it is now included near the beginning of the rule and highlights the importance of an accused's right to remain silent. The remaining subsections were moved and renumbered; the rule now generally follows the chronology of how the issues might arise at trial. The drafters did not intend to change any result in any ruling on evidence admissibility.

In subsection (b), the term "allegedly" was added. The term references derivative evidence and clarifies that evidence is not derivative unless a military judge finds, by a preponderance of the evidence, that it is derivative.

In subsections (c)(5), (d), (f)(3)(A), and (f)(7), the word "shall" was replaced with "will" or "must." The drafters agree with the approach of the Advisory Committee on Evidence Rules to minimize the use of words such as "shall" because of the potential disparity in application and interpretation of whether the word is precatory or prescriptive.

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(p) The analysis following Mil. R. Evid. 305 is amended by adding the following language after the final paragraph:

"2013 Amendment. The definition of "person subject to the code" was revised. The change clarifies that the rule includes a person acting as a knowing agent only in subsection (c).

Subsection (c) covers the situation where a person subject to the code is interrogating an accused, and therefore an interrogator would include a knowing agent of a person subject to the code, such as local law enforcement acting at the behest of a military investigator. The term "person subject to the code" is also used in subsection (f), which discusses a situation in which a person subject to the code is being interrogated. If an agent of a person subject to the code is being interrogated, subsection (f) is inapplicable, unless that agent himself or herself is subject to the code and is suspected of an offense.

The definition of "custodial interrogation" was moved to subsection (b) from subsection (d) and the definitions are now co-located. The definition is derived from *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966), and *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

"Accused" is defined as "[a] person against whom legal proceedings have been initiated." *Black's Law Dictionary* 23 (8th ed. 2004). "Suspect" is defined as "[a] person believed to have committed a crime or offense." *Id.* at 1486. In subsection (c)(1), the drafters recommended using the word "accused" in the first sentence because the rule generally addresses the admissibility of a statement at a court-martial at which legal proceedings have been initiated against the individual. Throughout the remainder of the rule, the drafters recommended using "accused" and "suspect" together to elucidate that an interrogation that triggers the need for Article 31 warnings will often take place before the individual has become an accused and is still considered only a suspect.

Although not specifically outlined in subsection (c), interrogators and investigators should fully comply with the requirements of *Miranda*. When a suspect is subjected to custodial interrogation, the prosecution may not use statements stemming from that custodial interrogation unless it demonstrates that the suspect was warned of his or her rights. 384 U.S. at 444. At a

minimum, *Miranda* requires that "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* A person subject to the code who is being interrogated may be entitled to both *Miranda* warnings and Article 31(b) warnings, depending on the circumstances.

The titles of subsections (c)(2) and (c)(3) were changed to "Fifth Amendment Right to Counsel" and "Sixth Amendment Right to Counsel" respectively; the drafters recommended this change because practitioners are more familiar with those terms. In previous editions, the subsections did not expressly state which right was implicated. Although the rights were clear from the text of the former rules, the new titles will allow practitioners to quickly find the desired rule.

Subsection (c)(3) is entitled "Sixth Amendment Right to Counsel" even though the protections of subsection (c)(3) exceed the constitutional minimal standard established by the Sixth Amendment as interpreted by the Supreme Court in *Montejo v. Louisiana*, 556 U.S. 778 (2009). In *Montejo*, the Court overruled its holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), and held that a defendant's request for counsel at an arraignment or similar proceeding or an appointment of counsel by the court does not give rise to the presumption that a subsequent waiver by the defendant during a police-initiated interrogation is invalid. 556 U.S. at 797-98. In the military system, defense counsel is detailed to a court-martial. R.C.M. 501(b). The accused need not affirmatively request counsel. Under the Supreme Court's holding in *Montejo*, the detailing of defense counsel would not bar law enforcement from initiating an interrogation with the accused and seeking a waiver of the right to have counsel present. However, subsection

(c)(3) provides more protection than the Supreme Court requires. Under this subsection, if an accused is represented by counsel, either detailed or retained, he or she may not be interrogated without the presence of counsel. This is true even if, during the interrogation, the accused waives his or her right to have counsel present. If charges have been preferred but counsel has not yet been detailed or retained, the accused may be interrogated if he or she voluntarily waives his or her right to have counsel present.

The words "after such request" were added to subsection (c)(2) and elucidate that any statements made prior to a request for counsel are admissible, assuming, of course, that Article 31(b) rights were given. Without that phrase, the rule could be read to indicate that all statements made during the interview, even those made prior to the request, were inadmissible. The drafters did not intend such a meaning, leading to this recommended change.

The drafters recommended changing the word "shall" to "will" in subsections (a), (d), and (f). The drafters agree with the approach of the Advisory Committee on Evidence Rules to minimize the use of "shall" because of the potential disparity in application and interpretation of whether the word is precatory or prescriptive.

In subsection (e)(1), the requirement that the accused's waiver of the privilege against self-incrimination and the waiver of the right to counsel must be affirmative was retained. This rule exceeds the minimal constitutional requirement. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the defendant remained mostly silent during a three-hour interrogation and never verbally stated that he wanted to invoke his rights to counsel and to remain silent. The Supreme Court held that the prosecution did not need to show that the defendant expressly waived his rights, and that an implicit waiver is sufficient. *Id*. at 384. Despite the Supreme Court's holding, under this rule, in order for a waiver to be valid, the accused or suspect must actually take

affirmative action to waive his or her rights. This rule places a greater burden on the government to show that the waiver is valid, and provides more protection to the accused or suspect than is required under the *Berghuis* holding.

In subsection (f)(2), the word "abroad" was replaced with "outside of a state, district, commonwealth, territory, or possession of the United States." This change clearly defines where the rule regarding foreign interrogations applies.

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(q) The analysis following Mil. R. Evid. 311 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* The definition of "unlawful" was moved from subsection (c) to subsection (b) and now immediately precedes the subsection in which the term is first used in the rule. Other subsections were moved and now generally follow the order in which the issues described in the subsections arise at trial. The subsections were renumbered and titled; this change makes it easier for the practitioner to find the relevant part of the rule. Former subsection (d)(2)(c), addressing a motion to suppress derivative evidence, was subsumed into subsection (d)(1). This change reflects how a motion to suppress seized evidence must follow the same procedural requirements as a motion to suppress derivative evidence.

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(r) The analysis following Mil. R. Evid. 312 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* The last sentence of former subsection (b)(2) was moved to a discussion paragraph; the drafters recommended this change because it addresses the conduct of the examiner rather than the admissibility of evidence. *See supra*, General Provisions Analysis. Failure to comply with the requirement that a person of the same sex conduct the examination does not make the examination unlawful or the evidence inadmissible.

In subsection (c)(2)(a), the words "clear indication" were replaced with "probable cause." "Clear indication" was not well-understood by practitioners nor properly defined in case law, whereas "probable cause" is a recognized Fourth Amendment term. The use of the phrase "clear indication" likely came from the Supreme Court's holding in *Schmerber v. California*, 384 U.S. 757 (1966). In that case, the Court stated: "In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." *Id.* at 770. However, in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), the Supreme Court clarified that it did not intend to create a separate Fourth Amendment standard when it used the words "clear indication." *Id.* at 540 ("[W]e think that the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence sought might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between 'reasonable suspicion' and 'probable cause.'"). The appropriate standard for a search under subsection (c)(2)(a) is probable cause. The President's adoption of the probable cause standard raised the level of suspicion required to perform a search under this subsection beyond that which was required in previous versions of this rule. The same reasoning applies to the change in

subsection (d), where the words "clear indication" were replaced with "probable cause." This approach is consistent with the Court of Military Appeals' opinion in *United States v. Bickel*, 30 M.J. 277, 279 (C.M.A. 1990) ("We have no doubt as to the constitutionality of such searches and seizures based on probable cause").

In subsection (d), the term "involuntary" was replaced with "nonconsensual" for the sake of consistency and uniformity throughout the subsection; the drafters did not intend to change the rule in any practical way by using "nonconsensual" in the place of "involuntary."

A discussion paragraph was added following subsection (e) to address a situation in which a person is compelled to ingest a substance in order to locate property within that person's body. This paragraph was previously found in subsection (e); the drafters recommended removing it from the rule itself because it addresses conduct rather than the admissibility of evidence. *See supra*, General Provisions Analysis.

The last line of subsection (f) was added; this change conforms the rule with CAAF's holding in *United States v. Stevenson*, 66 M.J. 15 (C.A.A.F. 2008). In *Stevenson*, the court held that any additional intrusion, beyond what is necessary for medical treatment, is a search within the meaning of the Fourth Amendment. *Id.* at 19 ("the Supreme Court has not adopted a de minimis exception to the Fourth Amendment's warrant requirement"). The drafters recommended moving the first line of former subsection (f) to a discussion paragraph because it addresses conduct rather than the admissibility of evidence, and is therefore more appropriately addressed in a discussion paragraph. *See supra*, General Provisions Analysis.

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(s) The analysis following Mil. R. Evid. 313 is amended by adding the following language after the final paragraph:

"2013 Amendment. The definition of "inventory was added to subsection (c) and further distinguishes inventories from inspections. This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(t) The analysis following Mil. R. Evid. 314 is amended by adding the following language after subparagraph (k):

"*2013 Amendment.* Language was added to subsection (a). This language elucidates that the rules as written afford at least the minimal amount of protection required under the Constitution as applied to service members. If new case law is developed after the publication of these rules which raises the minimal constitutional standards for the admissibility of evidence, that standard will apply to evidence admissibility, rather than the standard established under these rules.

Subsection (c) limits the ability of a commander to search persons or property upon entry to or exit from the installation alone, rather than anywhere on the installation, despite the indication of some courts in dicta that security personnel can search a personally owned vehicle anywhere on a military installation based on no suspicion at all. *See, e.g., United States v. Rogers*, 549 F.2d 490, 493-94 (8th Cir. 1976). Allowing suspicionless searches anywhere on a military installation too drastically narrows an individual's privacy interest. Although individuals certainly have a diminished expectation of privacy when they are on a military installation, they do not forgo their privacy interest completely.

A Discussion section was added below subsection (c) to address searches conducted contrary to a treaty or agreement. That material was previously located in subsection (c). The drafters recommended moving it to the Discussion because it addresses conduct rather than the admissibility of evidence. *See supra*, General Provisions Analysis.

Although not explicitly stated in subsection (e)(2), the Supreme Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), applies to this subsection. *See id.* at 114-15 (holding that a warrantless search was unreasonable if a physically present co-tenant expressly refused to give consent to search, even if another co-tenant had given consent).

In subsection (f)(2), the phrase "reasonably believed" was changed to "reasonably suspected." This change aligns the rule with recent case law and alleviates any confusion that "reasonably believed" established a higher level of suspicion required to conduct a stop-and-frisk than required by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The "reasonably suspected" standard conforms to the language of the Supreme Court in *Arizona v. Johnson*, 555 U.S. 323, 326 (2009), in which the Court stated: "To justify a pat down of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." This standard, and not a higher one, is required before an individual can be stopped and frisked under this subsection. Additionally, a discussion paragraph was added following this subsection to further expound on the nature and scope of the search, based on case law. *See, e.g.*, *Terry*, 392 U.S. at 30-31; *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977).

In subsection (f)(3), the drafters recommended changing the phrase "reasonable belief" to "reasonable suspicion" for the same reasons discussed above. The discussion section was added

to provide more guidance on the nature and scope of the search, based on case law. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) ("the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons"); *Mimms*, 434 U.S. at 111 (no Fourth Amendment violation when the driver was ordered out of the car after a valid traffic stop but without any suspicion that he was armed and dangerous because "what is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety"); *Maryland v. Wilson*, 519 U.S. 408 (1997) (extending the holding in *Mimms* to passengers as well as drivers).

The language from former subsection (g)(2), describing the search of an automobile incident to a lawful arrest of an occupant, was moved to the discussion paragraph immediately following subsection (f)(3). The drafters recommended this change because it addresses conduct rather than the admissibility of evidence. *See supra*, General Provisions Analysis. The discussion section is based on the Supreme Court's holding in *Arizona v. Gant*, 556 U.S. 332, 351 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest").

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(t) The analysis following Mil. R. Evid. 315 is amended by adding the following language after the final paragraph:

"2013 Amendment. Former subsection (h) was moved so that it immediately follows subsection (a). The drafters recommended changing this language to a discussion paragraph because it generally applies to the entire rule, rather than any particular subsection and also because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis.

In subsection (b), the term "authorization to search" was changed to "search authorization." This amendment aligns the rule with the term more commonly used by practitioners and law enforcement. The drafters recommended moving former subsection (c)(4) to a discussion paragraph immediately following subsection (c) because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis.

The second sentence in former subsection (d)(2) was moved to subsection (d). This change elucidates that its content applies to both commanders under subsection (d)(1) and military judges or magistrates under subsection (d)(2). The drafters made this recommendation in reliance on CAAF's decision in *United States v. Huntzinger,* 69 M.J. 1 (C.A.A.F. 2010), which held that a commander is not *per se* disqualified from authorizing a search under this rule even if he or she has participated in investigative activities in furtherance of his or her command responsibilities.

Former subsection (h)(4), entitled, "Search warrants," was moved to subsection (e), now entitled "Who May Search." This change co-locates it with the subsection discussing the execution of search authorizations.

In subsection (f)(2), the word "shall" was changed to "will." This change brings the rule in conformance with the approach of the Advisory Committee on Evidence Rules to minimize the use of words such as "shall" and "should" because of the potential disparity in application and interpretation of whether the word is precatory or prescriptive. In recommending this amendment, the drafters did not intend to change any result in any ruling on evidence admissibility.

Subsection (g) was revised. The drafters' intent behind this revision was to include a definition of exigency rather than to provide examples that may not encompass the wide range of situations where exigency might apply. The definition is derived from Supreme Court jurisprudence. *See Kentucky v. King*, 563 U.S. 452 (2011). The drafters recommended retaining language concerning military operational necessity as an exigent circumstance because this rule may be applied to a unique military context where it might be difficult to communicate with a person authorized to issue a search authorization. *See, e.g., United States v. Rivera*, 10 M.J. 55 (C.M.A. 1980) (noting that exigency might exist because of difficulties in communicating with an authorizing official, although the facts of that case did not support such a conclusion). Nothing in this rule would prohibit a law enforcement officer from entering a private residence without a warrant to protect the individuals inside from harm, as that is not a search under the Fourth Amendment. *See, e.g., Brigham City v. Stuart,* 547 U.S. 398 (2006) (holding that, regardless of their subjective motives, police officers were justified in entering a home without a warrant, under exigent circumstances exception to warrant requirement, as they had an objectively reasonable basis for believing that an occupant was seriously injured or imminently threatened with injury).

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(u) The analysis following Mil. R. Evid. 316 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* In subsection (a), the word "reasonable" was added and aligns the rule with the language found in the Fourth Amendment of the U.S. Constitution and Mil. R. Evid. 314 and 315.

In subsection (c)(5)(C), the drafters intended the term "reasonable fashion" to include all action by law enforcement that the Supreme Court has established as lawful in its plain view doctrine. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (holding that there was no search when an officer merely recorded serial numbers that he saw on a piece of stereo equipment, but that the officer did conduct a search when he moved the equipment to access serial numbers on the bottom of the turntable); *United States v. Lee*, 274 U.S. 559, 563 (1927) (use of a searchlight does not constitute a Fourth Amendment violation). The drafters did not intend to establish a stricter definition of plain view than that required by the Constitution, as interpreted by the Supreme Court. An officer may seize the item only if his or her conduct satisfies the three-part test prescribed by the Supreme Court: (1) he or she does not violate the Fourth Amendment by arriving at the place where the evidence could be plainly viewed; (2) its incriminating character is "readily apparent"; and (3) he or she has a lawful right of access to the object itself. *Horton v. California*, 496 U.S. 128, 136-37 (1990).

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility."

(v) The analysis following Mil. R. Evid. 317 is amended by adding the following language after the final paragraph:

"2013 Amendment. Former subsections (b) and (c)(3) were moved to a discussion paragraph. The drafters recommended this change because they address conduct rather than the admissibility of evidence. *See supra*, General Provisions Analysis.

This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(w) The analysis following Mil. R. Evid. 321 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(x) The title of the analysis section of Mil. R. Evid. 401 is changed to "Test for relevant evidence."

(y) The analysis following Mil. R. Evid. 401 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(z) The title of the analysis section of Mil. R. Evid. 402 is changed to "General admissibility of relevant evidence."

(aa) The analysis following Mil. R. Evid. 402 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(bb) The analysis following Mil. R. Evid. 403 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(cc) The title of the analysis section of Mil. R. Evid. 404 is changed to "Character evidence; crime or other acts."

(dd) The analysis following Mil. R. Evid. 404 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* The word "alleged" was added to references to the victim throughout this rule. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ee) The analysis following Mil. R. Evid. 405 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ff) The analysis following Mil. R. Evid. 406 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(gg) The analysis following Mil. R. Evid. 407 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(hh) The title of the analysis section of Mil. R. Evid. 408 is changed to "Compromise offers and negotiations."

(ii) The analysis following Mil. R. Evid. 408 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(jj) The title of the analysis section of Mil. R. Evid. 409 is changed to "Offers to pay medical and similar expenses."

(kk) The analysis following Mil. R. Evid. 409 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ll) The title of the analysis section of Mil. R. Evid. 410 is changed to "Pleas, plea discussions, and related statements."

(mm) The analysis following Mil. R. Evid. 410 is amended by adding the following language after the last paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(nn) The analysis following Mil. R. Evid. 411 is amended by adding the following language in a new paragraph following the current paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(oo) The title of the analysis section of Mil. R. Evid. 413 is changed to "Similar crimes in sexual offense cases."

(pp) The analysis following Mil. R. Evid. 413 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* The time requirement in subsection (b) was changed and aligns with the time requirements in Mil. R. Evid. 412 and the Federal Rules of Evidence. This change is

also in conformity with military practice in which the military judge may accept pleas shortly after referral and sufficiently in advance of trial. Additionally, subsection (d) was revised and aligns with the Federal Rules of Evidence.

This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(qq) The title of the analysis section of Mil. R. Evid. 414 is changed to "Similar crimes in child-molestation cases."

(rr) The analysis following Mil. R. Evid. 414 is amended by adding the following language after the final paragraph:

"2013 Amendment. The time requirement in subsection (b) was changed and aligns with the time requirements in Mil. R. Evid. 412 and the Federal Rules of Evidence. This change is also in conformity with military practice in which the military judge may accept pleas shortly after referral and sufficiently in advance of trial. Additionally, subsection (d) was revised and aligns with the Federal Rules of Evidence.

This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ss) The title of the analysis section of Mil. R. Evid. 501 is changed to "Privilege in general."

(tt) The analysis following Mil. R. Evid. 501 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(uu) The analysis following Mil. R. Evid. 502 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(vv) The analysis following Mil. R. Evid. 503 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ww) The analysis following Mil. R. Evid. 504 is amended by adding the following language after the final paragraph:

"2011 Amendment. Subsection (c)(2)(D) was added pursuant to Executive Order 13593 of December 13, 2011.

2013 Amendment. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(xx) The analysis following Mil. R. Evid. 505 is amended by adding the following language after the final paragraph:

"2013 Amendment. This rule was significantly restructured. These changes bring greater clarity and regularity to military practice. The changes focus primarily on expanding the military judge's explicit authority to conduct *ex parte* pretrial conferences in connection with classified information and detailing when the military judge is required to do so, limiting the disclosure of classified information per order of the military judge, specifically outlining the process by which the accused gains access to and may request disclosure of classified information, and the procedures for using classified material at trial. The drafters intended that the changes ensure

classified information is not needlessly disclosed while at the same time ensure that the accused's right to a fair trial is maintained. The drafters adopted some of the language from the Military Commissions Rules of Evidence and the Classified Information Procedures Act."

(yy) The analysis following Mil. R. Evid. 506 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This rule was significantly revised. These changes bring greater clarity to the rule and align it with changes made to Mil. R. Evid. 505."

(zz) The title of the analysis section of Mil. R. Evid. 507 is changed to "Identity of informants."

(aaa) The analysis following Mil. R. Evid. 507 is amended by adding the following language after the final paragraph:

"2013 Amendment. Subsection (b) was added to define terms that are used throughout the rule and adding subsection (e)(1) to permit the military judge to hold an in camera review upon request by the prosecution. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(bbb) The analysis following Mil. R. Evid. 509 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. The language "courts-martial, military judges" was added to this rule, which now conforms to CAAF's holding in *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009). In that case, CAAF held that this rule as it was previously written created an implied privilege that protected the deliberative process of a military judge from disclosure and that testimony that revealed the deliberative thought process of the military judge is inadmissible.

Matthews, 68 M.J. at 38-43. The changes simply express what the court found had previously been implied."

(ccc) The analysis following Mil. R. Evid. 511 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* Titles were added to the subsections of this rule, improving the rule's clarity and ease of use."

(ddd) The analysis following Mil. R. Evid. 513 is amended by adding the following language after the final paragraph:

"2011 Amendment. In Executive Order 13593 of December 13, 2011, the President removed communications about spouse abuse as an exception to the spousal privilege by deleting the words "spouse abuse" and "the person of the other spouse or" from Mil. R. Evid. 513(d)(2), thus expanding the overall scope of the privilege. The privilege is now consistent with Mil. R. Evid. 514 in that spouse victim communications to a provider who qualifies as both a psychotherapist for purposes of Mil. R. Evid. 513 or as a victim advocate for purposes of Mil. R. Evid. 514 are covered.

2013 Amendment. The amendment to subsection (e)(3) further expands the military judge's authority and discretion to conduct in camera reviews. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(eee) The analysis following Mil. R. Evid. 514 is amended by adding the following language after the final paragraph:

"2013 Amendment. Like the psychotherapist-patient privilege created by Mil. R. Evid. 513, Mil. R. Evid. 514 establishes a victim advocate-victim privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Implemented as another

approach to improving the military's overall effectiveness in addressing the crime of sexual assault, facilitating candor between victims and victim advocates, and mitigating the impact of the court-martial process on victims, the rule was developed in response to concerns raised by members of Congress, community groups, and the Defense Task Force on Sexual Assault in the Military Services (DTFSAMS). In its 2009 report, DTFSAMS noted that: 35 states had a privilege for communications between victim advocates and victims of sexual assault; victims did not believe they could communicate confidentially with medical and psychological support service personnel provided by DoD; there was interference with the victim-victim advocate relationship and continuing victim advocate services when the victim advocate was identified as a potential witness in a court-martial; and service members reported being "re-victimized" when their prior statements to victim advocates were used to cross-examine them in court-martial proceedings. *Report of the Defense Task Force on Sexual Assault in the Military Services,* at 69 (Dec. 2009). DTFSAMS recommended that Congress "enact a comprehensive military justice privilege for communications between a Victim Advocate and a victim of sexual assault." *Id.* at ES-4. The JSC chose to model a proposed Mil. R. Evid. 514 on Mil. R. Evid. 513, including its various exceptions, in an effort to balance the privacy of the victim's communications with a victim advocate against the accused's legitimate needs.

Under subsection (a) of Mil. R. Evid. 514, the words "under the Uniform Code of Military Justice" mean that the privilege only applies to alleged misconduct that could result in UCMJ proceedings. It does not apply in situations in which the alleged offender is not subject to UCMJ jurisdiction. The drafters did not intend Mil. R. Evid. 514 to apply in any proceeding other than those authorized under the UCMJ. However, service regulations dictate how the privilege is applied to non-UCMJ proceedings. Furthermore, this rule only applies to

communications between a victim advocate and the victim of an alleged sexual or violent offense.

Under subsection (b), the definition of "victim advocate" includes, but is not limited to, personnel performing victim advocate duties within the DoD Sexual Assault Prevention and Response Office (such as a Sexual Assault Response Coordinator), and the DoD Family Advocacy Program (such as a domestic abuse victim advocate). To determine whether an official's duties encompass victim advocate responsibilities, DoD and military service regulations should be consulted. A victim liaison appointed pursuant to the Victim and Witness Assistance Program is not a "victim advocate" for purposes of this rule, nor are personnel working within an Equal Opportunity or Inspector General office. For purposes of this rule, "violent offense" means an actual or attempted murder, manslaughter, rape, sexual assault, aggravated assault, robbery, assault consummated by a battery, or similar offense. A simple assault may be a violent offense where violence has been physically attempted or menaced. A mere threatening in words is not a violent offense. This rule will apply in situations where there is a factual dispute as to whether a sexual or violent offense occurred and whether a person actually suffered direct physical or emotional harm from such an offense. The fact that such findings have not been judicially established shall not prevent application of this rule to alleged victims reasonably intended to be covered by this rule.

Under subsection (d), the exceptions to Mil. R. Evid. 514 are similar to the exceptions found in Mil. R. Evid. 513, and the drafters intended them to be applied in the same manner. Mil. R. Evid. 514 does not include comparable exceptions found within Mil. R. Evid. 513(d)(2) and 513(d)(7). Under the "constitutionally required" exception, communications covered by the privilege would be released only in the narrow circumstances where the accused could show

harm of constitutional magnitude if such communication was not disclosed. The drafters intended this relatively high standard of release to preclude fishing expeditions for possible statements made by the victim; the drafters did not intend it to be an exception that effectively renders the privilege meaningless. If a military judge finds that an exception to this privilege applies, special care should be taken to narrowly tailor the release of privileged communications to only those statements that are relevant and whose probative value outweighs unfair prejudice. The fact that otherwise privileged communications are admissible pursuant to an exception of Mil. R. Evid. 514 does not prohibit a military judge from imposing reasonable limitations on cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *United States v. Gaddis*, 70 M.J. 248, 256-57 (C.A.A.F. 2011); *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011)."

(fff) The title of the analysis section of Mil. R. Evid. 601 is changed to "Competency to testify in general."

(ggg) The analysis following Mil. R. Evid. 601 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(hhh) The title of the analysis section of Mil. R. Evid. 602 is changed to "Need for personal knowledge."

(iii) The analysis following Mil. R. Evid. 602 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(jjj) The title of the analysis section of Mil. R. Evid. 603 is changed to "Oath or affirmation to testify truthfully."

(kkk) The analysis following Mil. R. Evid. 603 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(lll) The title of the analysis section of Mil. R. Evid. 604 is changed to "Interpreter."

(mmm) The analysis following Mil. R. Evid. 604 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This rule was revised to match the Federal Rules of Evidence. However, the word "qualified" is undefined both in these rules and in the Federal Rules of Evidence. R.C.M. 502(e)(1) states that the Secretary concerned may prescribe qualifications for interpreters. Practitioners should therefore refer to the Secretary's guidance to determine if an interpreter is qualified under this rule. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(nnn) The title of the analysis section of Mil. R. Evid. 605 is changed to "Military judge's competency as a witness."

(ooo) The analysis following Mil. R. Evid. 605 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ppp) The title of the analysis section of Mil. R. Evid. 606 is changed to "Member's competency as a witness."

(qqq) The analysis following Mil. R. Evid. 606 is amended by adding the following language:

"*2013 Amendment.* The amendment to subsection (b) aligns this rule with the Federal Rules of Evidence. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(rrr) The title of the analysis section of Mil. R. Evid. 607 is changed to "Who may impeach a witness."

(sss) The analysis following Mil. R. Evid. 607 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ttt) The title of the analysis section of Mil. R. Evid. 608 is changed to "A witness's character for truthfulness or untruthfulness."

(uuu) The analysis following Mil. R. Evid. 608 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(vvv) The title of the analysis section of Mil. R. Evid. 609 is changed to "Impeachment by evidence of a criminal conviction."

(www) The analysis following Mil. R. Evid. 609 is amended by adding the following language after the final paragraph:

"2011 Amendment. Executive Order 13593 of December 13, 2011, amended this rule to conform the rule with the Federal Rules of Evidence.

2013 Amendment. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(xxx) The analysis following Mil. R. Evid. 610 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(yyy) The title of the analysis section of Mil. R. Evid. 611 is changed to "Mode and order of examining witnesses and presenting evidence."

(zzz) The analysis following Mil. R. Evid. 611 is amended by adding the following language after the final paragraph:

"2013 Amendment. The amendment to subsection (d)(3) conforms the rule with the United States Supreme Court's holding in *Maryland v. Craig*, 497 U.S. 836 (1990), and the Court of Appeals for the Armed Forces' holding in *United States v. Pack*, 65 M.J. 381 (C.A.A.F.

2007). In *Craig*, the Supreme Court held that, in order for a child witness to be permitted to testify via closed-circuit one-way video, three factors must be met: (1) the trial court must determine that it "is necessary to protect the welfare of the particular child witness"; (2) the trial court must find "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) the trial court must find "that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis.*" *Craig*, 497 U.S. at 855-56. In *Pack*, CAAF held that, despite the Supreme Court's decision in *Crawford v. Washington*, the Supreme Court did not implicitly overrule *Craig* and that all three factors must be present in order to permit a child witness to testify remotely. *Pack*, 65 M.J. at 384-85. This rule as previously written contradicted these cases because it stated that any one of four factors, rather than all three of those identified in *Craig*, would be sufficient to allow a child to testify remotely. The changes ensured that this subsection aligned with the relevant case law.

The drafters took the language for the change to subsection (5) from 18 U.S.C. § 3509(b)(1)(C), which covers child victims' and child witnesses' rights. There is no comparable Federal Rule of Evidence but a military judge may find that an Article 39(a) session outside the presence of the accused is necessary to make a decision regarding remote testimony. The drafters of the change intended to limit the number of people present at the Article 39(a) session in order to make the child feel more at ease, which is why they recommended adding language limiting those present to "a representative" of the defense and prosecution, rather than multiple representatives.

This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(aaaa) The title of the analysis section of Mil. R. Evid. 612 is changed to "Writing used to refresh a witness's memory."

(bbbb) The analysis following Mil. R. Evid. 612 is amended by adding the following language after the final paragraph:

"2013 Amendment. The revision to Subsection (b) of this rule is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(cccc) The title of the analysis section of Mil. R. Evid. 613 is changed to "Witness's prior statement."

(dddd) The analysis following Mil. R. Evid. 613 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(eeee) The title of the analysis section of Mil. R. Evid. 614 is changed to "Court-martial's calling or examining a witness."

(ffff) The analysis following Mil. R. Evid. 614 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* In subsection (a), the word "relevant" was substituted for "appropriate." Relevance is the most accurate threshold for admissibility throughout these rules. Additionally, the phrase "Following the opportunity for review by both parties" was added to subsection (b); this change aligns it with the standard military practice to allow the counsel for both sides to review a question posed by the members and to voice objections before the military

judge rules on the propriety of the question. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(gggg) The title of the analysis section of Mil. R. Evid. 615 is changed to "Excluding witnesses."

(hhhh) The analysis following Mil. R. Evid. 615 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(iiii) The analysis following Mil. R. Evid. 701 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(jjjj) The title of the analysis section of Mil. R. Evid. 702 is changed to "Testimony by expert witnesses."

(kkkk) The analysis following Mil. R. Evid. 702 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(llll) The title of the analysis section of Mil. R. Evid. 703 is changed to "Bases of an expert's opinion testimony."

(mmmm) The analysis following Mil. R. Evid. 703 is amended by adding the following language:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(nnnn) The analysis following Mil. R. Evid. 704 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(oooo) The title of the analysis section of Mil. R. Evid. 705 is changed to "Disclosing the facts or data underlying an expert's opinion."

(pppp) The analysis following Mil. R. Evid. 705 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(qqqq) The title of the analysis section of Mil. R. Evid. 706 is changed to "Court-appointed expert witnesses."

(rrrr) The analysis following Mil. R. Evid. 706 is amended by adding the following language after the final paragraph:

"2013 Amendment. Former subsection (b) was removed. The authority of the military judge to tell members that he or she has called an expert witness is implicit in his or her authority to obtain the expert, and therefore the language was unnecessary. Although the language has

been removed, the military judge may, in the exercise of discretion, notify the members that he or she called the expert. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(ssss) The analysis following Mil. R. Evid. 707 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic. The drafters had no intent to change any result in any ruling on evidence admissibility."

(tttt) The title of the analysis section to Mil. R. Evid. 801 is changed to "Definitions that apply to this section; exclusions from hearsay."

(uuuu) The analysis following Mil. R. Evid. 801 is amended by adding the following language after the final paragraph:

"2013 Amendment. The title of subsection (d)(2) was changed from "Admission by party-opponent" to "An Opposing Party's Statement." This change conforms the rule with the Federal Rules of Evidence. The term "admission" is misleading because a statement falling under this exception need not be an admission and also need not be against the party's interest when spoken. In recommending this change, the drafters did not intend to change any result in any ruling on evidence admissibility."

(vvvv) The title of the analysis section of Mil. R. Evid. 802 is changed to "The rule against hearsay."

(wwww) The analysis following Mil. R. Evid. 802 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(xxxx) The title of the analysis section of Mil. R. Evid. 803 is changed to "Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness."

(yyyy) The analysis following Mil. R. Evid. 803 is amended by adding the following language after the final paragraph:

"2013 Amendment. Subsection (24), which stated: "Other Exceptions: [Transferred to Mil. R. Evid. 807]" was removed. Practitioners are generally aware that Mil. R. Evid. 807 covers statements not specifically covered in this rule, and therefore the subsection was unnecessary. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters had no intent to change any result in any ruling on evidence admissibility."

(zzzz) The title of the analysis section of Mil. R. Evid. 804 is changed to "Exceptions to the rule against hearsay – when the declarant is unavailable as a witness."

(aaaaa) The analysis following Mil. R. Evid. 804 is amended by adding the following language after the final paragraph:

"2013 Amendment. In subsection (b)(3)(B), the phrase "and is offered to exculpate the accused," was left despite the fact that it is not included in the current or former versions of the Federal Rules of Evidence. While subsection (24) in Mil. R. Evid. 803 was not removed, subsection (5) of Mil. R. Evid. 804, which directs practitioners to the residual exception in Mil. R. Evid. 807, was not removed. Leaving subsection (5) in place avoids having to renumber the remaining subsections. Although subsection (5) is not necessary, renumbering the subsections within this rule would have a detrimental effect on legal research and also would lead to

inconsistencies in numbering between these rules and the Federal Rules. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(bbbbb) The analysis following Mil. R. Evid. 805 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(ccccc) The title of the analysis section of Mil. R. Evid. 806 is changed to "Attacking and supporting the declarant's credibility."

(ddddd) The analysis following Mil. R. Evid. 806 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(eeeee) The analysis following Mil. R. Evid. 807 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(fffff) The title of the analysis section of Mil. R. Evid. 901 is changed to "Authenticating or identifying evidence."

(ggggg) The analysis following Mil. R. Evid. 901 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(hhhhh) The title of the analysis section of Mil. R. Evid. 902 is changed to **"**Evidence that is self-authenticating."

(iiiii) The analysis following Mil. R. Evid. 902 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* Language was added to subsection (11) and permits the military judge to admit non-noticed documents even after the trial has commenced if the offering party shows good cause to do so. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(jjjjj) The title of the analysis section of Mil. R. Evid. 903 is changed to "Subscribing witness's testimony."

(kkkkk) The analysis following Mil. R. Evid. 903 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(lllll) The title of the analysis section of Mil. R. Evid. 1001 is changed to "Definitions that apply to this section."

(mmmmm) The analysis following Mil. R. Evid. 1001 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(nnnnn) The analysis following Mil. R. Evid. 1002 is amended by adding the following language after the final paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(ooooo) The analysis following Mil. R. Evid. 1003 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(ppppp) The title of the analysis section of Mil. R. Evid. 1004 is changed to "Admissibility of other evidence of content."

(qqqqq) The analysis following Mil. R. Evid. 1004 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. "

(rrrrr) The title of the analysis section of Mil. R. Evid. 1005 is changed to "Copies of public records to prove content."

(sssss) The analysis following Mil. R. Evid. 1005 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(ttttt) The title of the analysis section of Mil. R. Evid. 1006 is changed to "Summaries to prove content."

(uuuuu) The analysis following Mil. R. Evid. 1006 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(vvvvv) The title of the analysis section of Mil. R. Evid. 1007 is changed to "Testimony or statement of a party to prove content."

(wwwww) The analysis following Mil. R. Evid. 1007 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(xxxxx) The title of the analysis section of Mil. R. Evid. 1008 is changed to "Functions of the military judge and the members."

(yyyyy) The analysis following Mil. R. Evid. 1008 is amended by adding the following language in a new paragraph following the current paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(zzzzz) The title of the analysis section of Mil. R. Evid. 1101 is changed to "Applicability of these rules."

(aaaaaa) The analysis following Mil. R. Evid. 1101 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(bbbbbb) The analysis following Mil. R. Evid. 1102 is amended by adding the following language after the final paragraph:

"2013 Amendment. This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

(cccccc) The analysis following Mil. R. Evid. 1103 is amended by adding the following language in a new paragraph following the current paragraph:

"*2013 Amendment.* This revision is stylistic and aligns this rule with the Federal Rules of Evidence. The drafters did not intend to change any result in any ruling on evidence admissibility."

Dated: March 17, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016-06403 Filed: 3/21/2016 8:45 am; Publication Date: 3/22/2016]